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IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed by public pension systems that invest billions of dollars in U.S. capital markets to fund obligations to their beneficiaries and, therefore, have a strong interest in the proper interpretation of the Private Securities Litigation Reform Act of 1995 ("PSLRA" or "Reform Act").

The New York State Common Retirement Fund ("NYSCRF") is the third largest public pension fund in the U.S., with over 980,000 members and beneficiaries and assets of approximately $140 billion. The California State Teachers' Retirement System is the largest teachers' retirement system in the U.S., with over 775,000 members and assets of more than $142 billion. The State of Wisconsin Investment Board invests over $75 billion in assets of the Wisconsin Retirement System (which has over 530,000 participants), the Wisconsin State Investment Fund, and other Wisconsin state trust funds. The Los Angeles County Employees Retirement Association is the largest county retirement system in the U.S., with 147,000 members and $35 billion in assets. The Teachers' Retirement System of Louisiana is the largest public retirement system in Louisiana, with 100,000 members and more than $11.9 billion in assets. The Arkansas Teacher Retirement System invests $11 billion in assets for the benefit of 112,000 members and beneficiaries. The Sacramento County Employees' Retirement System is a $6.2 billion pension plan for employees of Sacramento County, California. The Government of Guam Retirement Fund is a $3.94 billion pension plan for employees of the Government of Guam. The Louisiana Sheriffs Pension & Relief Fund is a $1.4 billion defined benefit pension plan for Louisiana sheriffs and deputies. The Jacksonville Police and Fire Pension Fund is an $886 million defined benefit pension

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of this brief and copies of their consent have been lodged with the Clerk of the Court.

plan for the police officers and firefighters of Jacksonville, Florida. The Anchorage Police and Fire Retirement System is a $400 million defined benefit pension plan for the police officers and firefighters of Anchorage, Alaska. In the aggregate, U.S. public pension plans cover more than 14 million workers and 6 million retirees and other beneficiaries and have assets of more than $2 trillion.[2]

The *amici*'s overriding responsibility is to invest for the long-term security of their active and retired members. As major investors with long-term outlooks, the *amici* are vitally concerned with the proper and efficient functioning of U.S. capital markets, and are particularly concerned that investors not be harmed by fraudulent conduct of issuers of publicly traded securities and others. Many state and local governments are constitutionally obligated to guarantee defined benefit retirement plans. Therefore, investment losses due to securities fraud fall directly on state and local governments and ultimately on taxpayers. If public pension funds are prevented from recovering money lost to securities fraud, the public will suffer.[3]

In recent years, public pension funds have become increasingly concerned about the integrity of the U.S. securities markets. Scandals at Enron, WorldCom, Global Crossing, Tyco, Xerox, Delphi, McKesson-HBO, and numerous others have caused hundreds of billions in losses to innocent investors. As investors who have been materially harmed by corporate fraud, *amici* have a strong interest that the law allow injured investors to recover from perpetrators of fraud.

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[2] *See* Gary W. Anderson & Keith Brainard, *Profitable Prudence: The Case for Public Employer Defined Benefit Pension Plans*, Pension Research Council Working Paper 2004-6, The Wharton School, University of Pennsylvania, *http://rider.wharton.upenn.edu/~prc/PRC/WP/WP2004-6.pdf* (2004).

[3] In 2005, investment earnings accounted for 74 percent of all public pension plan revenue and employer (*i.e.*, taxpayer) contributions for only 17 percent. *See* National Association of State Retirement Administrators, "Key Facts Regarding State and Local Government Defined Benefit Retirement Plans," *http://www.nasra.org/news/article.asp?newsid=112* (Jan. 2007).

The *amici* believe that investors' ability to redress corporate wrongdoing through private actions under the Securities Exchange Act of 1934 is essential to deter improper conduct and to recoup damages. Indeed, with the PSLRA, Congress sought "to increase the likelihood that institutional investors will serve as lead plaintiffs," based on its belief "that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 732. Following the passage of the Reform Act, the *amici* have served as lead plaintiffs in numerous cases resulting in substantial recoveries, including *In re WorldCom, Inc. Securities Litigation* (S.D.N.Y.), in which lead plaintiff NYSCRF secured a settlement of more than $6 billion from investment banks, auditors, officers and directors, and *In re Cendant Corp. Securities Litigation* (D.N.J.), in which co-lead plaintiff NYSCRF secured a $3.2 billion settlement.[4]

Before 1995, settlements for more than $20 million were unusual, and settlements of $100 million or more were exceedingly rare. Since 1995, seven cases have settled for $1 billion or more, and more than 20 cases have settled for more than $100 million. Recoveries have reached unprecedented levels because of the cases' merit and institutional investor leadership.[5] At the same time, a much larger percentage of suits

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[4] The *amici*, as long-term investors, also have an interest in preventing meritless, lawyer-driven litigation. As one of many ways the PSLRA discourages meritless cases, the statute's "professional plaintiff" provision bars a plaintiff from serving as lead plaintiff in more than five actions filed within three years, except as permitted by the court. *See* 15 U.S.C. § 78u-4(a)(3)(B)(vi). Notably, Congress gave courts discretion to allow "[i]nstitutional investors seeking to serve as lead plaintiff . . . to exceed this limitation [because they] do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 734.

[5] In the article that inspired the lead plaintiff provisions of the PSLRA, *see* S. Rep. 104-98, 1995 U.S.C.C.A.N. 679, 690 n.32,

(Cont'd)

filed since enactment of the PSLRA has been dismissed under the PSLRA's pleading standards.[6] Reflecting the PSLRA's deterrence of meritless cases, securities class action filings "plunged to a record low in 2006."[7] That decline has been most pronounced in the Seventh Circuit, where the number of securities class actions filed declined from an average of ten per year in 1996-2005, to two in 2006.[8] This drop demonstrates that the decision below has not encouraged frivolous shareholder suits.

SUMMARY OF ARGUMENT

The PSLRA's requirement that securities complaints allege facts giving rise to "a strong inference" that defendants acted with the required mental state should be construed in accordance with the plain language of the statute. Second Circuit cases decided after the PSLRA correctly construe the statute in light of its text and legislative history, and the approach of most other Circuits is consistent with that of the Second Circuit. Despite this, Petitioners and their *amici* ask this Court to rewrite the

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(Cont'd)

Professors Weiss and Beckerman predicted that "[t]he largest benefit of institutional supervision of class actions is likely to be settlement terms that are more favorable to the plaintiff class, on average, than those now negotiated by essentially unsupervised plaintiffs' attorneys." Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2121 (1995). Their prediction has been fulfilled, exactly as Congress intended.

[6] *See* NERA Economic Consulting, "Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar," Jan. 2, 2007, *http://www.nera.com/publication.asp?p_ID=3028*.

[7] Cornerstone Research, "Securities Class Action Case Filings: 2006: A Year In Review," at 1, *http://securities.stanford.edu/clearinghouse_research/2006_YIR/20070102-01.pdf* (2007).

[8] "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 15. The Seventh Circuit's decision was handed down on January 25, 2006. *See* Appendix at 1a.

statute, proposing standards that contradict both the PSLRA's plain language and Congress's intent. Petitioners' and their *amici's* interpretations of the PSLRA also raise unnecessary constitutional questions, because they would require courts, in deciding motions to dismiss, to weigh competing evidence, assess the credibility of witnesses who are referred to in pleadings, and make ultimate findings of fact, thereby invading the province of the jury under the Seventh Amendment. This Court should avoid these constitutional issues by declining these invitations to rewrite the statute.

As Congress, courts, and the Securities and Exchange Commission ("SEC") have long recognized, private securities litigation is an invaluable part of the overall enforcement regime that compensates defrauded investors, deters fraud, protects investor confidence, and promotes fair and efficient capital markets. "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. __, 126 S. Ct. 1503, 1509 (2006).

Contrary to Petitioners' claims, further reform of securities litigation is not necessary. Fewer securities class actions are filed now than in the past, and more of the actions are terminated on motions to dismiss. Institutional investors are appointed as lead plaintiffs in more than half of the cases, and achieve settlements one-third larger than individual plaintiffs. *See* "Securities Lawsuits – Classier Actions," *The Economist*, Feb. 15, 2007, at 76. Institutional plaintiffs also carefully choose and closely monitor counsel, press for substantial settlements, and negotiate lower attorneys' fees. *See id.* The PSLRA is working the way that Congress intended and no reason exists to raise the scienter pleading bar higher than required by the statute. Rewriting the PSLRA as Petitioners propose would weaken the securities laws' deterrent effect and violate Congress's intent to maintain honest, fair, and efficient capital markets.

Amici urge the Court to uphold the scienter pleading standard adopted by the Second Circuit and most other Circuits under the PSLRA. This standard, based on the statute's plain language, protects innocent companies and their investors by strongly discouraging frivolous litigation, as shown by the increasing dismissal rates and decreasing number of cases filed since 1995. Raising the pleading standard further – as proposed by Petitioners and their *amici* – would prevent meritorious cases from proceeding, deny recovery to investors injured by fraud, and weaken the deterrence of corporate malfeasance.

ARGUMENT

I. The PSLRA's Plain Language Requiring "A Strong Inference" Of Scienter Was Intended To Adopt The Second Circuit's Pleading Standard

The PSLRA requires a plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. 78u-4(b)(2). To determine the meaning of this language, this Court should use the well-established principle of looking first to the statute's text and turning to legislative history only if the text is ambiguous. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). The Second Circuit followed exactly this approach in *Novak v. Kasaks*, 216 F.3d 300, 310 (2d Cir. 2000) (emphasis added):

> *[O]ur interpretive task begins and ends with the text of the statute.* In drafting paragraph (b)(2), Congress specifically incorporated this circuit's "strong inference" language to define the pleading standard for securities fraud cases. *Compare* 15 U.S.C. 78u-4(b)(2) (requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"), *with Acito [v. IMCERA Group, Inc.]*, 47 F.3d [47,] 52 [(2d Cir. 1995)] ("[P]laintiffs must allege facts that give rise to a strong inference of fraudulent

> intent."). We agree with the Third Circuit that this "use of the Second Circuit's language *compels* the conclusion that the Reform Act establishes a pleading standard approximately equal in stringency to that of the Second Circuit." *In re Advanta Corp. [Sec. Litig.]*, 180 F.3d [525,] 534 [(3d Cir. 1999)]. *Cf. United States v. Johnson*, 14 F.3d 766, 770 (2d Cir. 1994) (finding that Congress's use of "substantially identical language" to that of an earlier statute "bespeaks an intention to import" judicial interpretations of that language into the new statute).

The Second Circuit's "strong inference" standard was "[r]egarded as the most stringent pleading standard" before the PSLRA was enacted. S. Rep. No. 104-98, 1995 U.S.C.C.A.N. 679, 694. Congress raised the bar nationally by adopting the Second Circuit's exact language.

Because the PSLRA unambiguously adopted the Second Circuit's "strong inference" standard, "no resort to the legislative history or the purposes of the PSLRA is required." *Novak*, 216 F.3d at 310. Rather, the meaning of a "strong inference" of scienter was already defined by well-developed case law that provides guidance as to what a securities fraud complaint must contain to satisfy this standard. In its most comprehensive decision addressing the pleading standards under the PSLRA, the Second Circuit held that the requisite "strong inference" may arise from *particularized facts* that defendants "(1) benefited in a concrete and personal way from the purported fraud . . . (2) engaged in deliberately illegal behavior . . . (3) knew facts or had access to information suggesting that their public statements were not accurate . . . or (4) failed to check information they had a duty to monitor." *Novak*, 216 F.3d at 311. The Second Circuit emphasized that courts "need not and should not rely on magic words such as motive and opportunity." *Id.* Thus, Petitioners mischaracterize the Second Circuit's

appropriately flexible reading of the statute, which considers all relevant facts in each case. *See* Petitioners' Br. at 36 n.16.[9]

Moreover, the claimed differences between the circuits' interpretations of the strong inference standard are overstated. While some courts cite purported distinctions in the application of the standard – for example, either generally disavowing or embracing motive and opportunity in the abstract as sufficient to plead a strong inference of scienter – in practice, virtually all courts require a showing of scienter based on a review of the *totality* of the facts. "Taken as a whole, the cases simply do not substantiate the fear that courts applying the motive and opportunity formulation will permit pleadings to go forward without facts strongly suggesting wrongdoing." *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 659 (8th Cir. 2001).

In fact, circuits that Petitioners claim are "split" consistently hold that a claim should be dismissed unless the totality of the facts alleged supports a strong inference of scienter. *See, e.g., In re Cabletron Sys. Inc.*, 311 F.3d 11, 27, 33 (1st Cir. 2002); *Novak v. Kasaks*, 216 F.3d at 311; *In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 148-49 (3d Cir. 2004); *Abrams v. Baker Hughes*, 292 F.3d 424, 430 (5th Cir. 2002); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 683 (6th Cir.), *cert. denied*, 126 S. Ct. 423 (2005); *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1261-62 (10th Cir. 2001). Thus, Petitioners' claim that confusion among the circuits requires this Court to adopt a wholly new pleading standard is ill-founded.

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[9] *Amici* concur with the United States that "[t]his case presents no question concerning the proper role of motive-and-opportunity allegations under the PSLRA, because respondents have not alleged that petitioner Notebaert had a motive and opportunity to defraud..." U.S. Br. at 18, n.5. Thus, the Court should decline the invitation by certain *amici* supporting Petitioners to eliminate motive and opportunity allegations as a way to plead scienter because the question is not properly before the Court.

Contrary to Petitioners' arguments, the PSLRA's use of "a strong inference" also demonstrates that Congress did not intend to require that the alleged facts support the strongest possible inference, the most plausible inference, or an inference that excludes all possible competing inferences. The statutory text requires particularized allegations giving rise to a "strong" inference of scienter. The dictionary definitions of "strong" that best fit this provision are "solid" or "persuasive." RANDOM HOUSE UNABRIDGED DICTIONARY 1886 (2d ed. 1993). If Congress meant to require a compelling or exclusive inference or the strongest or most plausible inference, it would have said so.

II. Legislative History Confirms That Congress Intended To Adopt The Second Circuit's Strong Inference Standard

Because the statute's text is unambiguously based on the Second Circuit's "strong inference" test, no examination of legislative history is necessary. *See Novak*, 216 F.3d at 310. However, if the Court wishes to consider legislative history, the SEC's previous examination of that history is compelling. The SEC's examination of the legislative history, which is contained in the SEC's *amicus* brief in *Bryant v. Avado Brands, Inc.*, No. 98-9253, 1999 WL 33631523 (11th Cir. Feb. 16, 1999) (referred to herein as "SEC's *Novak* Br."),[10] led the SEC to conclude that:

> The correctness of the district court's holding that the Reform Act adopts the Second Circuit standard [not only] is established by the Act's language. It is confirmed by authoritative statements by Congress in the legislative history of the Act and by Congress and the President in the legislative history of the related, recently enacted Securities Litigation Uniform Standards Act of 1998 . . . [T]he Commission submits this brief to urge the Court to

[10] The SEC's *amicus* brief filed with the Second Circuit in *Novak v. Kasaks* included its *amicus* brief from *Bryant v. Avado Brands, Inc.* as an attachment.

> adopt this dominant and correct interpretation of the Reform Act.

1999 WL 33631523, at *5. In *Novak*, the SEC argued that the PSLRA's legislative history inexorably leads to the conclusion that Congress enacted the Second Circuit's pleading standard. *See id.* at *12-13 (citing floor comments by Conference Committee Managers). The SEC further explained that the legislative history following President Clinton's veto of the PSLRA reconfirmed Congress's intent to adopt the Second Circuit standard. *See id.* at *13-14 (Senator Domenici said that the pleading standard "is the Second Circuit's pleading standard"); *see also* 141 Cong. Rec. S19,067-068 (1995).

In 1998, Congress reaffirmed that it had adopted the Second Circuit's pleading standard when it passed the Securities Litigation Uniform Standards Act ("SLUSA"):

> The [PSLRA] established a heightened uniform Federal standard on pleading requirements *based upon the pleading standard applied by the Second Circuit Court of Appeals*. Indeed, the express language of the Reform Act itself carefully provides that plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."

H.R. Conf. Rep. 105-803, *available at* 1998 WL 703964, at *15 (emphasis added). Thus, legislative history demonstrates that when Congress enacted the "strong inference" requirement, it intended to adopt the Second Circuit standard.[11]

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[11] The SEC's *Novak* Brief convincingly refutes the contention by Petitioners and certain *amici* that a single footnote in the PSLRA Conference Committee Report, which states that the Reform Act "does not intend to codify the Second Circuit's case law," means that the Act was intended to raise the standard *above* the Second Circuit. As the SEC explained, "[t]he Conference Committee did not intend to codify each and every word of the Second Circuit's case law because of the

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III. The PSLRA Has Successfully Achieved Its Goals Of Deterring Frivolous Litigation While Allowing Meritorious Cases To Proceed

The PSLRA has already achieved Congress's intent under the prevailing interpretation of the statute. Since 1995, the dynamics of securities class actions, especially cases involving large investor losses, have changed radically. Institutional investors have come to the fore in most such cases. They have sought appointment as lead plaintiffs, pressed counsel to prosecute class members' claims vigorously, and negotiated lower attorney fees, as a percentage of recoveries, than was typical before the PSLRA.

Despite this, Petitioners and several of their *amici* claim that securities fraud litigation is still rife with abuse. Yet the sources on which Petitioners and their *amici* rely predate the PSLRA.[12] As a consequence of the elimination of aiding and

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view that *some cases did not apply the Second Circuit pleading standard in a sufficiently stringent manner . . . . [T]his does not mean that Congress did not adopt the Second Circuit standard.*" 1999 WL 33631523, at *18-19 (emphasis added); *see also* 141 Cong. Rec. S17,960 (1995) (Senator Dodd said that "we are trying to hold to that [standard that] came out of the second circuit, not on a case-by-case basis where they differed in some degree in interpretation").

[12] For example, Petitioners and virtually all their *amici* quote, as if it described the current litigation environment, this Court's discussion *in 1975* of problems then posed by potentially abusive securities fraud claims. *See, e.g.*, Petitioners' Br. at 28 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)). Petitioners and several *amici* also cite Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991). But that study looked at class actions filed during the mid-1980s that advanced claims based primarily on Section 11 of the Securities Act of 1933, which does not require scienter. It is irrelevant to cases under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, and has been thoroughly discredited by other scholars. *See, e.g.*, Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 453 (1994); Weiss & Beckerman, 104 YALE L.J. at 2080-84.

abetting liability in private securities litigation in 1994[13] and the enactment of the PSLRA in 1995 and SLUSA in 1998, securities litigation today is vastly different. Potentially frivolous cases no longer pose the problems described a decade ago, while meritorious cases have gained prominence in response to recent outbreaks of corporate wrongdoing. Based upon the most recent evidence, under the PSLRA, recoveries have exponentially increased, the number of lawsuits filed has substantially declined, and the dismissal rate has jumped.[14]

The most recent study by NERA Economic Consulting, whose work was cited by Congress when debating the PSLRA, found that in 2006, class action filings dropped 36% from 2005, and 44% from the overall post-PSLRA average. *See* NERA, "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 2. A similar study by Cornerstone Research found a 49% decline from 2005, and a 66% decline from the historic average. *See* "Securities Class Action Case Filings: 2006: A Year In Review," *supra* n.7, at 1.

Moreover, NERA reports that "the probability of a company facing a suit that survives a motion to dismiss has fallen by more than 30%." "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 3. The probability of a shareholder class action being brought in the first place has dropped nearly 10% to 1.6%. *See id.* Dismissal rates have doubled since the passage of the PSLRA. *See id.* at 4. On the other hand, with regard to settlement value, NERA reports:

> This year will stand out as one of record settlements. There were more settlements over $100 million – the so-called mega-settlements – in 2006 than in 2005, itself a record-breaking year.

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[13] *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

[14] Data reflecting dismissal rates undercut any claim that differences in substantive standards have caused forum shopping. *See* "Recent Trends in Shareholder Class Action Litigation," *supra* n.6, at 4.

Id. at 1. Thus, contrary to Petitioners' argument that "securities fraud suits are particularly subject to meritless strike suits," Pet. Br. at 27 (citing law review articles from 1991), fewer cases are being filed, and those that proceed to discovery are much stronger, resulting in larger recoveries for plaintiffs. The current regime is working and no policy reason exists to rewrite the PSLRA.

IV. Petitioners And Their Amici Inappropriately Seek To Re-Write The PSLRA

The Second Circuit's standard for pleading "a strong inference" of scienter has provided meaningful guidance, and courts have applied that standard in a consistent fashion. In contrast, the varied and confusing formulations proposed by Petitioners and their *amici*, which would require this Court to graft words onto the PSLRA, would defeat Congress's intent.

Petitioners propose rewriting the PSLRA to "impose[] a burden on the plaintiff to plead specific facts that, if proven to be true, cogently demonstrate a substantial claim as to scienter *that meaningfully tends to exclude innocent possibilities*." Pet. Br. at 16 (emphasis added). This formulation contains concepts that—unlike the Second Circuit's "strong inference" requirement—have no grounding in judicial decisions handed down before or after passage of the PSLRA. Neither the PSLRA's language nor case law provides any basis for requirements such as "cogently demonstrate," "substantial claim," or "meaningfully tends to exclude innocent possibilities." By importing these concepts, Petitioners ask this Court to rewrite the PSLRA, inviting the constitutional issues discussed below.

Petitioners' *amici* similarly ask this Court to rewrite the PSLRA, proposing that:

> [A] court will necessarily have to consider whether the facts alleged in the complaint leave open a range of non-culpable explanations for the defendant's conduct . . . [W]here there is a substantial possibility

> that the defendant acted without scienter, the inference of scienter will not be strong.

U.S. Br. at 8-9. Again, these concepts – "non-culpable explanations" and "substantial possibility" – are found nowhere in the PSLRA. The standards proposed by other Petitioners' *amici* are similarly confusing, sharing only that: (1) with no justification, they seek to apply *more stringent* pleading standards than the Second Circuit formulation that Congress adopted; and (2) they find no support in either the PSLRA's language, case law existing when the PSLRA was passed, or legislative history.[15]

Proving a defendant's state of mind turns on facts that vary with the circumstances. The Second Circuit recognizes this: "[G]eneral standards offer little insight into precisely what actions and behaviors constitute recklessness sufficient for § 10(b) liability. It is the actual facts of our securities fraud cases that provide the most concrete guidance as to the types of allegations required" to plead scienter. *Novak v. Kasaks*, 216 F.3d at 308. Even in criminal cases, where the government must prove beyond a reasonable doubt that the defendant had the

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[15] The Securities Industry and Financial Markets Association and the Chamber of Commerce of the USA propose that "plaintiffs alleging claims for securities fraud must plead facts that strongly tend to exclude innocent explanations for the challenged conduct." SIFMA/Chamber of Commerce Br. at 2; *see also id.* at 25 n.5 ("the recklessness standard is 'too amorphous' and 'belies the existence of a bright-line test'"). The American Institute of Certified Public Accountants and six accounting firms propose that "plaintiff must plead particularized facts that, if proven, lead convincingly to the conclusion that the defendant acted with scienter." AICPA Br. at 2-3. The Washington Legal Foundation proposes that "[u]nder the PSLRA, if the adverse inferences drawn from the particularly pled facts in the complaint do not tend to exclude the defendant's having acted with a non-culpable mental state, then Congress's 'strong inference' standard in the PSLRA should not be met as a matter of law." WLF Br. at 23. The Court should decline all of these invitations to rewrite the statute.

requisite criminal intent, it need not disprove every alternative theory regarding defendant's state of mind. *See, e.g., United States v. Ebbers*, No. S4 02 Cr. 1144 (BSJ), Charge to the Jury (S.D.N.Y.), *available as* 1492 PLI/Corp 477, at *518-20 ("It is not necessary for the Government to show that the defendant was fully informed as to all the details of the conspiracy" or that the defendant "receive[d] any monetary benefit.").

Petitioners nonetheless argue that plaintiffs' allegations must "*meaningfully tend[] to exclude innocent possibilities*." Pet. Br. at 16 (emphasis added). By requiring plaintiffs to negate all innocent inferences, Petitioners seek to dramatically heighten the pleading standard. The PSLRA requires that the complaint support "a strong inference" of scienter, not eliminate every possible negative inference. Possible negative inferences can be overcome, even at trial, by a review of the "total mix" of information, as is true in criminal law. *Bourjaily v. United States*, 483 U.S. 171, 180 (1987) ("[T]he sum of an evidentiary presentation may well be greater than its constituent parts . . . a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.").

Further, requiring complaints to eliminate every possible innocent inference would enable corporate insiders who commit securities fraud to insulate themselves from liability by taking steps designed to create the illusion of innocent conduct. By fabricating innocent explanations for their actions, perpetrators of fraud could create very weak, but facially plausible, innocent inferences that would lead to dismissal of meritorious cases before any discovery under Petitioners' reading of the PSLRA. Congress did not intend to immunize fraud in that way.

V. The "Strong Inference" Requirement Should Be Read In The Context Of The PSLRA's Integrated Provisions Designed Both To Discourage Frivolous Lawsuits And To Encourage Meritorious Lawsuits

Petitioners and their *amici* present the scienter pleading standard as their sole defense against meritless cases, but in fact it is only one of the PSLRA's many provisions designed to protect innocent defendants. The PSLRA is a carefully balanced statute that erected numerous hurdles to frivolous securities fraud claims, along with provisions designed to strengthen the prosecution of meritorious cases.[16]

To filter meritorious from frivolous cases, Congress enacted provisions relating not only to pleading scienter, but also requiring court appointment of lead plaintiffs and lead counsel, raising the pleading standard for false and misleading statements, imposing a discovery stay, sanctioning abusive litigation, limiting damages and attorneys' fees, and creating a safe harbor for forward-looking statements, among other provisions. *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. at 1511.[17]

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[16] In interpreting the statute, the Court should be "guided not by 'a single sentence or member of a sentence, but [should] look[] to the provisions of the whole law, and to its object and policy.'" *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (internal citation omitted); *see also Dolan v. United States Postal Serv.*, 546 U.S. 481, 126 S. Ct. 1252, 1257 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

[17] The PSLRA further ensures against lawyer-driven litigation by limiting the lead plaintiffs' share of any final judgment or settlement to their pro rata share of the class's recovery, plus any reasonable costs and expenses approved by the court. *See* 15 U.S.C. § 78u-4(a)(4). The PSLRA also prohibits referral fees to any broker or dealer for assisting an attorney in obtaining clients for any securities class action. *See* 15 U.S.C. § 78o(c)(8). Thus, the PSLRA ended perceived abuses in the relationship between certain plaintiffs' lawyers and their clients.

Under these provisions, lead plaintiffs are appointed after court scrutiny of their economic interest and adequacy as class representatives. Their complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint [must] state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Courts rigorously enforce these standards. *See, e.g., Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004); *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 892-93 (8th Cir. 2002). The PSLRA also imposes a discovery stay, which eliminates the cost and burden of complying with discovery requests that could coerce defendants into settling meritless cases, and the possibility that plaintiffs could use discovery to support a complaint. 15 U.S.C. § 78u-4(b)(3)(B).

Further, the PSLRA requires the court to make "specific findings" upon final adjudication of every securities class action regarding compliance by each party and attorney with Federal Rule of Civil Procedure 11(b). 15 U.S.C. § 78u-4(c). Unlike other civil actions in which a court may consider Rule 11 sanctions only after the challenged party has notice and an opportunity to withdraw the challenged pleading, in securities class actions, the court-appointed lead plaintiff and counsel must litigate knowing that the court will scrutinize their conduct in every case under Rule 11. Together with the pleading standards and the stay of discovery, these requirements powerfully deter frivolous complaints.[18]

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[18] Other barriers to meritless cases in the PSLRA include the provision that each defendant's liability for non-knowing misconduct is proportionate to its jury-determined share of responsibility, and liability is only joint and several in cases of knowing misconduct, *see* 15 U.S.C. § 78u-4(f)(2); that plaintiffs have the burden of proving that their losses were caused by defendants' misstatements or omissions, (Cont'd)

VI. Permitting Plaintiffs Only "The Most Plausible Of Competing Inferences" Would Violate The Seventh Amendment

The Court should reject Petitioners' proposed interpretation of the PSLRA scienter pleading standard because it would violate plaintiffs' right to a jury trial under the Seventh Amendment.[19] The Sixth and Seventh Circuits have correctly noted that permitting plaintiffs only "'the most plausible of competing inferences'" is problematic under the Seventh Amendment. *See* App. at 20a (quoting *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d at 683 n.25). Indeed, Petitioners' reading of the PSLRA would unconstitutionally transform the trial court into the ultimate finder of fact for scienter. The statutory language and Congressional intent require no such unconstitutional result. If the Court considers Petitioners' reading a possible alternative, however, the doctrine of avoiding unnecessary constitutional questions should weigh heavily against Petitioners' interpretation of the statute. Indeed, a recent scholarly study

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see 15 U.S.C. § 78u-4(b)(4); that damages are limited based on the mean trading price of the securities during the 90 days after disclosure of the truth about the misrepresentations or omissions, *see* 15 U.S.C. § 78u-4(e); and that forward-looking statements cannot form the basis of liability if they comply with a safe harbor, *see* 15 U.S.C. § 78u-5.

[19] The right to jury trial in suits for damages under the federal securities laws is beyond question. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974) ("when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts . . . a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law"); *Dasho v. Susquehanna Corp.*, 461 F.2d 11, 20-23 (7th Cir.) (recognizing right to jury trial in federal securities law action for damages), *cert. denied*, 408 U.S. 925 (1972); *Myzel v. Fields*, 386 F.2d 718, 740-42 (8th Cir. 1967) (same), *cert. denied*, 390 U.S. 951 (1968).

confirms that Petitioners' position poses grave constitutional concerns in light of the common-law right to jury trial.[20]

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one – the one the Court would adopt in any event. . . . Rather, the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation – when that interpretation is *reasonable*, though not necessarily the best." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 356, 358-59 (1998) (Scalia, J., dissenting) (emphasis in original; internal citations omitted). The doctrine of avoiding constitutional doubt has special force regarding the Seventh Amendment. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

A. Courts May Not Weigh Evidence And Assess Witness Credibility

Petitioners' proposed pleading standard would violate the Seventh Amendment because it would require courts to weigh competing facts, including assessing witnesses' credibility, to determine, on motions to dismiss, whether complaints "plead specific facts that, if proven to be true, cogently demonstrate a substantial claim as to scienter that

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[20] *See* Suja A. Thomas, *The PSLRA's Seventh Amendment Problem, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968893 #PaperDownload* (Mar. 7, 2007).

meaningfully tends to exclude innocent possibilities." Pet. Br. at 16. Petitioners emphasize that courts should "weigh . . . facts that support an inference of innocence" against facts that support an inference of scienter, and should "review[] the complaint with an eye on the plaintiff's ultimate prospects for success . . . ." *Id.* at 17, 23.

The Seventh Amendment, however, bars courts from weighing competing facts to make the ultimate determination of liability. "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick*, 293 U.S. at 486. Dismissal at the pleading stage is constitutionally permissible only when there are no "factual issues to be resolved," but only "questions of law for the court to decide." *Kelly v. United States*, 789 F.2d 94, 97-98 (1st Cir. 1986).

This Court has cautioned on the narrow scope of the judicial role on dismissal motions:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Such a "limited" scope of power to close the courthouse door to plaintiffs before they even gain access to discovery is essential to preserve the right to trial by jury.

Heightened pleading standards may be enacted through rulemaking or legislation, as evidenced by Federal Rule of Civil Procedure 9(b) and the PSLRA. However, pleading standards may not render the trial judge the ultimate finder of fact. This requirement is inherent in "the accepted rule that a complaint should not be dismissed for failure to state

a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A court deciding a motion to dismiss under the PSLRA may measure plaintiff's allegations against the statutory requirement of a strong inference of scienter, but the court may not constitutionally weigh conflicting evidence or assess the credibility of the witnesses quoted in the complaint. The Constitution reserves to the jury the power to weigh conflicting evidence and assess witnesses' credibility:

> In the federal system, the Constitution itself commits the trial of facts in a civil cause to the jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624-25 (1991). The "substance of right" preserved by the Seventh Amendment "requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative." *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593, 596 (1897). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999) (if a question is "predominantly factual," then "in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury"); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996) ("the substance of the common-law right of trial by jury" can be measured by "the distinction between substance and procedure" and by "the line . . . between issues of fact and law") (internal citation and quotation marks omitted); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 539 (1958) ("the

[factfinding] function assigned to the jury is an essential factor in the process for which the Federal Constitution provides") (internal citation and quotation marks omitted).

B. A Pleading Standard May Not Authorize A Court To Exercise Powers It May Not Constitutionally Exercise On Summary Judgment Or At Trial

The constitutional impropriety of Petitioners' proposed standard for PSLRA motions to dismiss is highlighted by comparison with the established standards on summary judgment and on motions for judgment as a matter of law. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment comports with the Seventh Amendment because "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. This Court has taken care to limit the judge's role on summary judgment in order to preserve the factfinding power of the jury:

> [Summary judgment] by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

477 U.S. at 255. In fact, even though summary judgment motions are generally heard only after the completion of discovery, "there is no such thing as a finding of fact on summary judgment. What are sometimes loosely termed 'findings' are instead facts

as to which there is no genuine issue." *Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997).[21]

The well-established standard for judgment as a matter of law (which is substantially the same as the standard for summary judgment, *see Anderson*, 477 U.S. at 251-52) likewise supports rejection of Petitioners' interpretation of the PSLRA. The Court has upheld the practice of directing a verdict for insufficiency of evidence, because such a directed verdict was permitted under the common law. *See Galloway v. United States*, 319 U.S. 372, 390-91 (1943). As the Court has repeatedly held, such a directed verdict comports with the Seventh Amendment because on a motion for judgment as a matter of law (as a directed verdict is now styled under Fed. R. Civ. P. 50(a)), a court must "give credence" only to evidence favoring the nonmoving party, "must draw all reasonable inferences in favor of the nonmoving party, and . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990) ("in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party"); *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949) (same); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943) (same); Advisory Committee Notes to 1991 Amendment to Fed. R. Civ. P. 50(a) ("The expressed standard [that 'there is no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmoving] party'] makes

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[21] The United States (U.S. Br. at 28) cites *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273 (1917), which held that summary judgment in an equity case to enforce a bond did not offend the Seventh Amendment. 243 U.S. at 278-79. *Pease*'s reasoning was superseded by the merger of law and equity upon the adoption of the Federal Rules of Civil Procedure in 1938. In any event, summary judgment does *not* empower judges to find facts.

clear that action taken under the rule . . . is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment").[22]

The Court's decisions regarding summary judgment in antitrust cases are consistent with these principles. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court held that "cutting prices in order to increase business often is the very essence of competition" and that "economic realities tend to make predatory pricing conspiracies self-deterring." *Id.* at 594, 595. Therefore, "petitioners had no motive to enter into the alleged

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[22] *Galloway* affirmed a directed verdict, because this Court held that plaintiff's case rested on "sheer speculation," "with[held] crucial facts," suffered from "inherent vagueness," and "omitted or withheld" "essential elements." 319 U.S. at 396. The *Galloway* Court's statement that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even [in 1791] so widely among common-law jurisdictions," is therefore fully consistent with the principle that a court has no power to find the facts. 319 U.S. at 392. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), and *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), cited by the United States (U.S. Br. at 27-28), upheld the validity of directed verdicts under the Seventh Amendment, but provide no support for making the court the factfinder. "The aim of the amendment is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form and procedure, *and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury* under appropriate instructions by the court." *Baltimore & Carolina Line, Inc.*, 295 U.S. at 657 (emphasis added). Similarly, *In re Peterson*, 253 U.S. 300 (1920), cited by the United States (U.S. Br. at 27), permits the use of a court-appointed auditor to report on the facts because "the parties will remain as free to call, examine, and cross-examine witnesses [before the jury] as if the report had not been made" and "[n]o incident of the jury trial is modified or taken away" by the auditor's role. 253 U.S. at 311.

conspiracy," and summary judgment for defendants was appropriate "where the evidence of conspiracy is speculative or ambiguous." *Id.* at 595. *Matsushita* turned on economic analysis of objective market data, not assessment of witnesses' credibility and weighing of conflicting evidence. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1073 (6th Cir. 1993) (*Matsushita* "does not require weighing credibility"). This Court was careful to affirm in *Matsushita* that even in antitrust conspiracy cases, "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." 475 U.S. at 587 (alterations in original; internal citation omitted). *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), which affirmed a jury verdict finding a price-fixing conspiracy, defines the "standard of proof" required in a jury trial but provides no support for empowering the court to find facts on motions to dismiss in violation of the Seventh Amendment. *Id.* at 755.[23]

Congress recognized in the PSLRA that scienter in securities cases remains a question of fact whose ultimate determination is reserved to the jury; it expressly provided that at defendants' request, the court must "submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred." 15 U.S.C. § 78u-4(d). "District Judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given

[23] Similarly, the "gatekeeping role for the judge" regarding admission or exclusion of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), neither offends the Seventh Amendment nor supports the pleading standard proposed by Petitioners. "The direction to take a 'hard look' at the basis of a scientific opinion [under *Daubert*] does not require weighing credibility" and therefore comports with the right to jury trial. *Elkins*, 8 F.3d at 1073.

to their testimony. They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution." *Reid v. Maryland Cas. Co.*, 63 F.2d 10, 11 (5th Cir. 1933).

Construing the PSLRA to require judges to assess witnesses' credibility, weigh the conflicting facts alleged by plaintiffs and defendants, and determine whether a complaint establishes "the most plausible of competing inferences" that "tends to exclude" any innocent inference would obliterate the Seventh Amendment lines between fact and law and between substance and procedure that demarcate the provinces of jury and judge.

VII. The SEC Correctly Argued In Twelve Prior Cases That The PSLRA Adopted The Second Circuit's "A Strong Inference" Pleading Standard

According to the SEC, "[i]n using the term 'strong inference' *Congress adopted the Second Circuit standard.*" SEC's *Novak* Brief, 1999 WL 33631523, at *5 (emphasis added).

> [T]he Reform Act uses the "strong inference" language, which the Second Circuit developed as a pleading standard in a long line of securities cases. *It may be presumed, absent contrary evidence, that Congress intended to adopt the judicial definition of that pleading standard.*

Id. at *10 (emphasis added). In its *Novak* Brief, the SEC further stated:

> *This [Second Circuit] test is proven, sound, widely used, and consistent with the Reform Act's purposes.* Nothing in the language or history of the Act shows that the Act deviates from this established means of pleading a "strong inference."

Id. at *5 (emphasis added). Based on this view, the SEC urged the *Novak* court to "adopt this dominant and correct

interpretation of the Reform Act." *Id.* The *Novak* court agreed with the SEC (*see* 213 F.3d at 310-11), and its decision has been generally followed.

Despite this position in twelve prior cases,[24] the SEC now claims for the first time that Congress "*built upon* the Second Circuit's 'strong inference' terminology and added various other pleading requirements, resulting in a statute that was intended to *strengthen* existing pleading requirements." U.S. Br. at 18 (emphasis added). This altered position is erroneous and should be rejected. As the SEC previously recognized and repeatedly argued, there is no basis to contend that the plain meaning of the "strong inference" requirement of the PSLRA means anything other than the Second Circuit's standard, whose exact language Congress enacted into law. *See also Novak*, 216 F.3d at 310 ("we conclude that the PSLRA effectively raised the nationwide pleading standard to that previously existing in this circuit

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[24] The following SEC amicus briefs argue that the PSLRA adopted the Second Circuit pleading standard: (1) *Caprin v. Simon Transportation Services*, No. 01-4049, 2001 WL 34664973 (10th Cir. July 2, 2001); (2) *In re K-Tel Int'l, Inc. Sec. Litig.*, No. 00-3210 MN, 2000 WL 35483737 (8th Cir. Nov. 15, 2000); (3) *Helwig v. Vencor, Inc.*, No. 99-5153, 2000 WL 34432856 (6th Cir. Aug. 18, 2000); (4) *Weld v. Stage Stores, Inc.*, No. 00-20230, 2000 WL 34032458 (5th Cir. June 2000); (5) *Lone Star Ladies Investment Club v. Schlotzsky's, Inc.*, No. 99-50958, 1999 WL 33620099 (5th Cir. Dec. 28, 1999); (6) *Nathenson v. Zonagen Inc.*, No. 99-20449, 1999 WL 33613893 (5th Cir. Sept. 30, 1999); (7) *Greebel v. FTP Software, Inc.*, No. 98-2194, 1999 WL 33911562 (1st Cir. May 1999); (8) *Novak v. Kasaks*, No. 98-9641 (2d Cir. Mar. 16, 1999) (in this case, the SEC filed a short statement to which its complete brief in *Bryant v. Avado Brands, Inc.* ((9) below) was attached); (9) *Bryant v. Avado Brands, Inc.*, No. 98-9253, 1999 WL 33631523 (11th Cir. Feb. 16, 1999); (10) *In re Comshare, Inc. Sec. Litig.*, No. 97-2098, 1997 WL 34039763 (6th Cir. Nov. 1997); (11) *In re Silicon Graphics, Inc. Sec. Litig.*, No. 97-16240, 1997 WL 33551249 (9th Cir. Nov. 1997); and (12) *Zeid v. Kimberley*, No. 97-16070, 1997 WL 33555504 (9th Cir. Oct. 1997).

and no higher (with the exception of the 'with particularity' requirement)"). [25]

This Court has held that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Moreover, an agency's interpretation of legislation that was contemporaneous with the legislation is entitled to considerably more deference than the agency's later, inconsistent interpretation. *See Watt v. Alaska*, 451 U.S. at 272-73. "[T]he SEC's present position is flatly contradicted by its past actions" and deserves no deference. *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 566 (1979). The SEC's prior, consistent position in twelve separate amicus briefs filed in circuit courts across the country during the first six years after enactment of the PSLRA is more persuasive and deserves greater weight than its current, inconsistent view, announced for the first time in its brief in this case.

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[25] In its *Novak* Brief, the SEC also stressed the importance of the Reform Act's intent to import the Second Circuit's standard that allowed "recklessness" to be the basis for alleging a "strong inference" of scienter, stating:

> The Commission . . . believes that elimination of the recklessness liability would encourage corporate directors and officers to put their heads in the sand and would have enormously counterproductive effects on the integrity of corporate disclosure and the quality of corporate governance.

1999 WL 33631523, at *10.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

(7)

06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in numerous cases addressing the proper scope of the Fourth Amendment.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has throughout its long history defended and protected the civil liberties of Asian Americans and other minorities. The decision below creates the real possibility that police who stop and search vehicles on the basis of racial profiles will be able to circumvent the protections of the Fourth Amendment.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. As part of that mission, the NAACP has vigorously opposed the use of racial profiling by law enforcement officials to target minority drivers and their passengers. *See, e.g.*, Dr. Dwight Steward & Dr. Douglas Berg, TEXAS STATE CONFERENCE OF NAACP BRANCHES RACIAL PROFILING STUDY: A STATISTICAL EXAMINATION OF RACIAL PROFILING (2000), *available at* http://www.texasnaacp.org/rp.doc. While eliminating racial profiling will require a multi-faceted effort, obtaining meaningful enforcement of the Fourth Amendment by the courts is an essential component to protecting our rights as citizens against unconstitutional stops, searches and seizures.

STATEMENT OF THE CASE

On November 27, 2001, at roughly 1:40 a.m., Sutter County Sheriff's Deputy Robert Charles Brokenbrough stopped a car being driven by Karen Simeroth. *People v. Brendlin*, 38 Cal. 4th 1107, 1111 (Cal. 2006). Earlier that evening, while in the parking lot of a Circle K market, Brokenbrough had noticed that the registration tag on the Buick was expired, but he was informed by dispatch that an application for renewal was "in process" and did not attempt to question the driver of the car or to effect a traffic stop at that time. *Id.* When he later saw the car on Franklin Road, Brokenbrough noticed a temporary operating permit on the car, consistent with the application for renewal, that did not expire until the end of the month. *Id.* He nevertheless pulled the car over for a traffic stop to see whether the temporary

operating permit affixed to the rear window matched the vehicle. *Id.*

In its brief before the California State Supreme Court, the State conceded that Brokenbrough had no reasonable articulable suspicion to stop the car, because "[a] vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit." *Id.* at 1114. The traffic stop was thus unlawful. *Id.*

Bruce Brendlin was a passenger in Simeroth's car. *Id.* at 1111. After the vehicle was pulled over, both Simeroth and Brendlin were asked to identify themselves. *Id.* Because Brokenbrough recognized Brendlin and believed him to be a parolee at large, he contacted dispatch, which informed Brokenbrough that a "no bail" warrant had been issued for Brendlin's arrest. *Id.* Brokenbrough immediately ordered Brendlin out of the car at gunpoint and seized a syringe cap during a search incident to arrest. *Id.* at 1111-12. A subsequent search of the car uncovered various items related to the manufacture of methamphetamine. *Id.*

Brendlin was charged with multiple counts relating to the possession and manufacture of methamphetamine. *See* Petition for Writ of Certiorari at 4, *Brendlin v. California*, No. 06-8120 (U.S. Nov. 28, 2006). The trial court denied his motion to suppress, but the California Court of Appeal reversed, finding that, because Brendlin had been detained by the traffic stop within the meaning of the Fourth Amendment, he was entitled to have the evidence against him suppressed as the fruit of the unlawful stop. *Brendlin*, 38 Cal. 4th at 1112-13. The California Supreme Court disagreed. It held that because Brendlin was a passenger in the car and not the driver, he had not been seized by the traffic stop as a constitutional matter because he was "free to ignore the

police presence and go about his . . . business." *Id.* at 1117. Thus, even though the evidence against Brendlin would not have been uncovered but for the concededly illegal stop, and even though it was inadmissible against the driver, the court held that he was not entitled to suppression. *Id.* at 1123.

This Court granted certiorari to decide the following question: Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop. *Brendlin v. California*, 127 S. Ct. 1145 (2007).

SUMMARY OF ARGUMENT

The California Supreme Court's ruling that Brendlin was not seized by the traffic stop at issue is flawed in two pivotal ways. First, the lower court erroneously assumed that a reasonable person in Brendlin's situation would have felt free to leave the car when it was initially pulled over — a holding that defies common sense, not least because the stop had no reasonable or identifiable purpose. Second, contrary to this Court's unambiguous precedent, the California Supreme Court improperly relied upon the police officer's subjective intent in order to determine whether and when the seizure occurred.

Because Petitioner's Brief will discuss both of these issues in detail, *amici* will address them only briefly. Instead, this brief will focus upon the impact an affirmance of the lower court's ruling would have on arbitrary and illegal stops and searches based on race, *i.e.*, on the practice of racial profiling. The California Court's ruling threatens to leave

Fourth Amendment protections, but would have particularly pernicious consequences for minority passengers.

ARGUMENT

I. THE STANDARD GOVERNING SEIZURE USED BY THE CALIFORNIA SUPREME COURT IS INCONSISTENT WITH THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE.

A. Petitioner Was Seized By The Traffic Stop Because A Reasonable Person In His Circumstances Would Not Have Felt Free To Leave.

The California Supreme Court's premise that Brendlin "knew he was free to ignore the police presence and go about his business . . . even if he was unable as a practical matter to leave the scene until the car came to halt," 38 Cal. 4th at 1121, is inconsistent with the facts of this case, this Court's precedent, and realistic assessments about a reasonable passenger's perception of what he is permitted to do when subjected to a traffic stop.

According to the state supreme court, "[a]bsent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot — i.e., exit the vehicle . . . and thereby terminate the encounter with the officer." *Brendlin*, 38 Cal. 4th at 1120. Setting aside the myriad individual circumstances under which this proposition is arguably untrue — for example, when there is inclement weather, the stop is conducted late at night (as was the case here), or the stop is conducted on the side of a busy highway — it is plain that a reasonable person would ordinarily not believe that he is simply free to leave a car that has been pulled over by law

enforcement until there is some indication that this is the case.[2]

That is especially true when, as here, the stop is unsupported by any legitimate law enforcement purpose. Because Simeroth had not in fact been violating any traffic laws, neither Simeroth nor Brendlin had any reason to know why the car had been pulled over, and thus no way of knowing who or what the police were investigating. Under the circumstances, it was entirely reasonable for both to assume that they had been seized by the police and that neither was free to leave the car. The objective reasonableness of that perception was reinforced in this case when Brendlin was asked to identify himself as soon as the officer approached the car. *Brendlin*, 38 Cal. 4th at 111.[3]

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[2] This Court's decision in *Mendenhall* notes that her encounter with DEA agents at the airport might "reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males." The Court goes on to acknowledge the relevance of those factors but concludes that the totality of the evidence in the case supported a finding of consent. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980). It is difficult to imagine any conceivable traffic stop under which any reasonable passenger — much less a person of color, or a person without a college education, or a young woman pulled over by two male law enforcement officers — would feel free simply to walk away from the car without assurance from the police that doing so was acceptable.

[3] *Cf. Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 182-83 (2004) (identifying 21 states where a person may be subject to criminal penalty for refusing to identify himself to a police officer after a lawful stop).

This Court, moreover, has recently held that a passenger can be arrested based on contraband found in a stopped car, *Maryland v. Pringle*, 540 U.S. 366, 374 (2003), and that a passenger's personal effects are subject to search if there is probable cause to search the car, *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999). The Court has justified these rulings on the ground that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing." *Pringle*, 540 U.S. at 373 (quoting *Houghton*, 526 U.S. at 304-05). If the nexus of a car and its occupants is close enough to support the arrest of a passenger or search of a passenger's effects, it is surely close enough for a reasonable passenger to believe that he is not a mere bystander who is free to leave once the car is stopped.

Additionally, a reasonable passenger who knows that the officer can order him out of the car even if he does not wish to exit, *Maryland v. Wilson*, 519 U.S. 408, 410 (1997), may not only feel subject to the officer's authority, but fear the possible consequences of suddenly exiting the car without permission in the event that his attempt to leave is misconstrued by the police officer as a threat to the officer's or the public's safety.

Finally, the claim that passengers have not been seized also defies reality and common sense in another typical traffic stop scenario, when the officer approaches the car and asks for consent to search the vehicle. At that point, a reasonable passenger is likely to know that any rapid exit from the car — particularly if it is stopped in a high crime area — may itself constitute a basis for reasonable suspicion and hence further police action. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Passengers in California, like

Brendlin, have even more reason to believe this is the case. The California Court of Appeal has explicitly stated that its precedent does not "stand for the proposition that after a traffic stop, the officer must stand by while the doors of the vehicle fly open and passengers leave in all directions." *People v. Castellon*, 76 Cal. App. 4th 1369, 1376 n.2 (Cal. Ct. App. 1999).

For all these reasons, it is entirely reasonable for passengers like Brendlin to conclude that they are not initially free to leave a car that has been pulled over by law enforcement. In fact, the situation of a car passenger like Brendlin is far different from that of petitioners in *Florida v. Bostick*, 501 U.S. 429 (1991), or *I.N.S. v. Delgado*, 466 U.S. 210 (1984), whose "freedom of movement was restricted by a factor independent of police conduct." *Bostick*, 501 U.S. at 436. In *Bostick*, petitioner was on a bus about to depart on a long distance trip and so would not have felt free to leave even if the police had not boarded the bus. *Id.* at 436. Similarly, in *Delgado*, petitioners were at work during normal working hours and were thus confined by virtue of that fact. 466 U.S. at 218. In contrast, a passenger in a car that has just been pulled over cannot be said to be free to go about his business, for his business was to continue in his travels in that car; instead, he has been brought to a halt solely by police conduct.[4]

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[4] This analysis does not mean that the initial seizure of a passenger created by virtue of a traffic stop is *per se* unreasonable; when there is reasonable suspicion to effect the traffic stop, *i.e.* the stop is lawful, the initial seizure of the passenger will be just as lawful as that of the driver. How long the seizure of a passenger may continue must depend on the totality of the circumstances in each case.

This analysis comports with the common sense assumptions reasonable people have regarding their rights during a traffic stop by recognizing that passengers like Brendlin are just as seized for Fourth Amendment purposes as the driver of the stopped car. It thus also means that passengers like Brendlin who have been subjected to an unlawful stop can vindicate their Fourth Amendment right to be free from unreasonable seizure in a court of law. Should this Court disagree, and find that all passengers are indeed initially free to leave a car as soon as it has been pulled over for a traffic stop, it should announce that holding unambiguously. Absent that clear holding, reasonable passengers will continue to believe that they are not free to leave until the police indicate otherwise.

B. The Lower Court Improperly Relied On The Subjective Intent Of The Officer To Conclude That A Reasonable Passenger Would Have Felt Free To Leave.

It is well settled that "a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554; *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) ("This 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."). It is also clear that the seizure determination is to be made from the point of view of the person who is the object of the officer's attentions, rather than from that of the officer. *Mendenhall*, 446 U.S. at 555 n.6 ("[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted

to leave, is irrelevant except insofar as that may have been conveyed to the respondent."); *cf. Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Although the lower court opinion begins with an accurate recitation of the standard for determining whether a seizure has taken place, the one the court actually applied functionally eviscerates this Court's holding in *Mendenhall* by placing excessive emphasis on police officer intent. The California Supreme Court's inquiry referred throughout to the subjective intent of the police officer despite the fact that that intent was neither communicated to Brendlin nor would have been apparent to a reasonable person in his position. The court asserted, for example, that "Deputy Brokenbrough's flashing lights were directed at the driver, Karen Simeroth, and not at defendant." *Brendlin*, 38 Cal. 4th at 1118. A reasonable passenger, however, has no conceivable means of knowing at whom an officer's flashing lights are directed, particularly where, as here, there were no lawful grounds for the stop. Indeed, the lower court went so far as to state, "[w]e think it more sensible to leave it up to the officer, once cause for the vehicle stop has been established, to decide who should be seized and when." *Id.* at 1121 n.4.

The lower court's logic would place the determination of when a seizure has occurred squarely within the hands of officers themselves, who would be free to testify to their subjective intentions about whether and when a particular person was seized, regardless of whether those intentions were apparent. The protection afforded by the Fourth Amendment against unreasonable seizures becomes meaningless if police officers themselves are permitted to

provide *post hoc* determinations of whether and when a particular person had been seized — and thereby functionally to decide who is to be afforded Fourth Amendment protection.

The incentive for law enforcement officers simply to assert in all cases that the passengers at issue were not seized until after evidence was uncovered against them will be great, and perfectly lawful, if the lower court's rule is upheld. The problem raised by this possibility is precisely the reason why this Court has heretofore insisted upon an objective reasonableness standard from the point of view of the person confronted.

II. Failing To Recognize That Passengers Are Seized Will Permit The Use Of Arbitrary And Discriminatory Stops That Offend The Core Principles Of The Fourth Amendment.

A. The Lower Court's Ruling Would Permit Arbitrary And Discriminatory Stops As To Passengers.

Although the issue before this Court is whether Brendlin was seized and not whether that seizure was in fact reasonable, the *per se* unreasonableness of the stop to which he was subjected is nevertheless relevant to this Court's inquiry.

The Fourth Amendment clearly prohibits both arbitrary and discriminatory seizures. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); *United States v. Brignoni-Ponce*, 422 U.S.

873, 878 (1975). Although the reasonableness of a seizure depends upon "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers," *id.*, there is simply no legitimate public interest in arbitrary or discriminatory stops, and they are accordingly unlawful. Such stops are not, and should not, be shielded from Fourth Amendment scrutiny.

It is axiomatic that the driver of a vehicle that was arbitrarily or discriminatorily stopped may vindicate her Fourth Amendment rights, for example, via a motion to suppress evidence that would not have been gathered but for the stop. Should this Court affirm the California court's ruling, however, any evidence gathered against passengers in the very same car will be admissible even though it too was the product of an unlawful stop. The lower court's ruling would create the incongruous situation in which the same evidence gathered from the same concededly unlawful stop, which affected both driver and passenger equally, could be used against one person in the car but not another. It would functionally permit baseless stops with respect to a whole class of people: passengers.

The California Supreme Court's ruling creates an incentive for law enforcement to take advantage of that incongruity. Because evidence uncovered as a result of an arbitrary or discriminatory stop would still be admissible against passengers, law enforcement officers will have little reason to curtail such stops. This is not an incentive structure that the Fourth Amendment was designed to tolerate; an increase in arrests and convictions may result, but at a price this Court has already repeatedly rejected. *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (finding a roving Border Patrol stop and search without

probable cause or reasonable suspicion unconstitutional under the Fourth Amendment); *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

In *Whren*, this Court suggested that allegations of racial profiling can be addressed through an Equal Protection claim seeking damages and injunctive relief. 517 U.S. at 813. This Court did not suggest, however, that a Fourth Amendment violation and an Equal Protection violation represent the same constitutional injury, or that redress for one provides satisfactory redress for the other. Rather, the Court held in *Whren* that there had been no Fourth Amendment violation to redress because the car stop at issue there was lawful. *Id.* Here, by contrast, the car stop was concededly unlawful.

Unlike the knock-and-announce violation in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), moreover, the unlawful car stop in this case involved more than an issue of timing. The entry into Hudson's home would only have been delayed for a few seconds had the officers properly knocked and announced their presence. Brendlin, on the other hand, would never have been seized as part of the car stop if the police in this case had complied with the Fourth Amendment. The increased threat to privacy creates a correspondingly increased need for an effective deterrent against police misconduct.

Furthermore, the fact that someone else in the vehicle may bring a constitutional claim to remedy systemic deficiencies (*i.e.*, the driver), does not mean that others who

have suffered from the same Fourth Amendment violation should be unable to do so — particularly where, as here, the two parties may have wholly different legal interests.

Finally, the necessity of showing a pattern and practice of racial discrimination can be nearly insurmountable for individuals, much less a showing of actual discriminatory intent. *See, e.g., Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001). There will also be individuals who do not wish to file a civil action or do not have a civil claim, but rather only seek to exclude evidence that was gathered against them perhaps as the result of a racially suspect stop and search.

B. The Lower Court Ruling And The Incentives It Would Create For Law Enforcement Would Disproportionately Affect Minorities.

The incentive the California court ruling creates for police officers to engage in arbitrary stops would, of course, affect all passengers. But the discriminatory stops and attendant searches it would newly permit with respect to passengers will have particular resonance for minority motorists. Statistical evidence tells us that minority passengers will be disproportionately affected by a ruling that bars passengers in general from challenging unlawful stops and by any increase in the number of unlawful stops that result from such a ruling. Some data indicates that minority motorists are stopped at higher rates than their white counterparts. Much more data establishes that minority motorists are disproportionately subjected to searches once they have been stopped — even though searches of minorities are not any more likely to uncover evidence of criminal wrongdoing than searches of whites. A disproportionate number of minority passengers will

accordingly be left without Fourth Amendment recourse when subjected to discriminatory stops if this Court affirms the lower court's ruling.

i. Stop Rates

There is some evidence that cars with African American occupants are more likely to be stopped, even when there is no law enforcement incentive to engage in arbitrary or discriminatory stops.[5] For example:

- *Kansas*: In a multijurisdictional report on traffic stops, the Police Foundation found that, of the seven Kansas police departments assessed, "all are targeting either Blacks or Hispanics and three of the six who were assessed for both Blacks and Hispanics are targeting both."[6]
- *Maryland*: In an official report to the State, the Maryland Justice Analysis Center found that 36% of all stops in Maryland were of African Americans. The report concluded that "the fact that 36% of all the law eligible stops involved a black driver does raise concerns given that the population in Maryland is 28% black."[7]
- *Minnesota*: A statewide survey found that all minority populations, except Asians, were stopped at a higher rate

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[5] *See generally*, David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL. F. 237, 250 (1994) (discussing evidence of racial disparity in traffic stops).

[6] JOHN C. LAMBERTH, POLICE FOUND., A MULTIJURISDICTIONAL ASSESSMENT OF TRAFFIC ENFORCEMENT AND DATA COLLECTION IN KANSAS 143 (2003), *available at* http://www.racialprofilinganalysis.neu.edu/IRJ_docs/KS_2003.pdf.

[7] MD. JUSTICE ANALYSIS CTR., REPORT TO THE STATE OF MARYLAND ON LAW ELIGIBLE TRAFFIC STOPS 8 (2004), *available at* http://www.mdle.net/traffic/2004report.pdf [hereinafter MARYLAND REPORT].

than whites. African American motorists were stopped at the highest rate — over three and a half times more often than white motorists.[8]

- *Minnesota (St. Paul)*: A 2001 study by the Institute on Race & Poverty concluded that African Americans in St. Paul, Minnesota, were stopped in disproportionately high numbers compared to their proportion of the city's adult population. Whites, who represented 73.18% of the population, accounted for only 57.67% of all stops whereas African Americans, who represented 10.22% of the population, accounted for 26.25% of all stops.[9]

- *Missouri*: The state Attorney General reported that African Americans in Missouri represent 10.6% of the adult population but 15.1% of all vehicle stops. In other words, African Americans are stopped at a rate 42% higher than expected based solely on their proportion of the adult population. African Americans were 46% more likely than whites to be stopped in 2005.[10]

There is also evidence that, despite this Court's admonitions more than 30 years ago in *Brignoni-Ponce* and *Almeida-Sanchez*, traffic stops are also being conducted on

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[8] INST. RACE & POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 10 (2003), *available at* http://www.irpumn.org/uls/resources/projects/aggregate%20report%2092303.pdf [hereinafter MINNESOTA REPORT].

[9] INST. RACE & POVERTY, REPORT ON TRAFFIC STOP DATA COLLECTED BY THE SAINT PAUL POLICE DEPARTMENT APRIL 15 THROUGH DECEMBER 15, 2000 4-6 (2001), *available at* http://www1.umn.edu/irp/SPPD0522.pdf [hereinafter ST. PAUL REPORT]

[10] ATTORNEY GEN. OF THE STATE OF MO., MISSOURI VEHICLE STOPS 2005 ANNUAL REPORT, *available at* http://www.ago.mo.gov/racialprofiling/2005/racialprofiling2005.htm#findings [hereinafter MISSOURI REPORT].

people suspected of being Mexican in order to check their immigration status.[11]

Although other jurisdictions have not reported any racial discrepancies in their stop rates, there is good reason to believe that such discrepancies are underreported because of the use of unadjusted census data. Many stop rate studies use the proportion of minorities in the general population as a baseline in order to assess racial discrepancies. As the Police Executive Research Forum notes, however, stop rates calculated using such data do not take into account the fact that the proportion of minorities who own and use vehicles may be smaller than the proportion of that minority group in the population at large.[12] Seemingly benign stop rates may thus actually mask racially biased policing. In addition, increased police discretion to engage in unlawful stops with impunity with respect to passengers may well result in further racial discrepancies in stop rates.

ii. Search Rates

Even if the rate at which minorities and whites are stopped were identical, the evidence that race matters once a car has been stopped is striking. In a national survey published in 2006, the United States Department of Justice found that African Americans were nearly three times as

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[11] *See, e.g., Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 737 (N.D. Ohio 2000); Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17; Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1.

[12] LORIE A. FRIDELL, POLICE EXECUTIVE RESEARCH FORUM, BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS 75 (2004), *available at* http://www.justice.utah.gov/Research/Race/PERF%20by%20the%20Numbers.pdf.

discretionary form of search. African American drivers represented 16.1% of consent searches, "well above their 10.4% portion of vehicle stops." Hispanic representation in consent search rates was also disproportionate — 32.5% of consent searches compared to 27.7% of stops.[16]

- *Colorado*: Of individuals stopped by the State Patrol in 2002, Hispanic drivers comprised 15% of those stopped, but over 30% of those searched.[17]

- *Illinois*: In 2006, a state-sponsored study of the prior year's traffic stops revealed that minority motorists were more likely to be subjected to a consent search than white motorists. The survey concluded that "in spite of the fact that there are fewer consent searches [than in 2004], application of consent searches by race has become more problematic."[18]

- *Maryland*: A 2004 statewide survey of traffic stops in Maryland established that the highest rate of searches was for Hispanic males (9.9% stopped are searched) followed by African American males (7.5%), and white males (5.6%).[19]

- *Minnesota (St. Paul)*: According to data gathered by the St. Paul Police Department, after being stopped, African

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[16] DR. GARY CORDNER ET AL., VEHICLE STOPS IN SAN DIEGO: 2001 8 (2002), *available at* http://www.sandiego.gov/police/pdf/stoprpt.pdf.

[17] COLORADO STATE PATROL, 2002 TRAFFIC STOP SUMMARY 8 (2004), *available at* http://csp.state.co.us/Upload/03trafficstopdata.pdf [hereinafter COLORADO REPORT].

[18] ALEXANDER WEISS & AVIVA GRUMET-MORRIS, NORTHWESTERN UNIV. CTR. PUB. SAFETY, ILLINOIS TRAFFIC STOPS STATISTICS STUDY, 2005 ANNUAL REPORT 7 (2006), *available at* http://www.dot.state.il.us/trafficstop/2005annualreport.pdf.

[19] MARYLAND REPORT, *supra* note 7, at 9.

Americans, Hispanics and Native Americans in St. Paul, Minnesota, are subjected to pat down searches of their persons and searches of their vehicles at rates higher than the search rates for white drivers. For example, in searches that produced no contraband whatsoever, 19.6% of African Americans and 16.7% of Hispanics, but only 8.4% of whites, were patted down and had their vehicles searched.[20]

- *Missouri*: The 2005 Annual Report of the Attorney General's Office found that, across the state of Missouri, African Americans were 1.78 times more likely to be searched than whites and Hispanics 1.98 times more likely.[21]

- *Ohio (Cleveland)*: A 2006 University of Cincinnati report found that, even after controlling for other relevant factors, a driver's race has a "significant influence over whether or not searches are conducted [in Cleveland]. The odds of being searched are 1.3 times higher for Black drivers compared to Caucasian drivers." The report also found that African American motorists were more likely to be searched for discretionary reasons.[22]

- *Rhode Island*: An official review of statewide traffic stops in Rhode Island found that 2.9% of whites but 5.9% of non-whites were subject to a discretionary search upon being stopped by the police. In other words, "non-whites are significantly more likely than whites to be subjected

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[20] SAINT PAUL REPORT, *supra* note 9, at 4, 15.

[21] MISSOURI REPORT, *supra* note 10.

[22] ROBIN ENGEL ET AL., UNIV. OF CINCINNATI DIV. OF CRIMINAL JUSTICE, CLEVELAND DIVISION OF POLICE TRAFFIC STOP DATA STUDY: FINAL REPORT xiii (2006), *available at* http://www.uc.edu/criminaljustice/ProjectReports/Cleveland_Traffic_Stop_Study.pdf.

to a discretionary search. Statewide, the odds of a non-white motorists [sic] being searched are roughly twice that of a white driver being searched."[23]

- *Tennessee*: A statewide survey of traffic stops in Tennessee found that police officers searched 16.8% of Hispanics stopped, 8.1% of African Americans, and 5.8% of whites. When stopping vehicles for moving violations, officers searched 14.1% of Hispanics, 5.7% of African Americans, and 4.4% of whites. When stopping vehicles for vehicle equipment violations, officers searched 20.3% of Hispanics, 12.7% of African Americans, and 8.3% of whites.[24]

A rule that bars passengers from challenging the unlawfulness of a stop (and the admissibility of the fruits of that stop) would disproportionately affect minorities because minority motorists are disproportionately searched. While the rule announced by the California high court has troubling implications for all passengers — particularly given the incentive it provides to law enforcement to increase the number of unreasonable stops in the hopes of gathering otherwise inadmissible evidence — minorities will be particularly affected given the reality of disproportionate search rates.

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[23] AMY FARRELL & JACK MCDEVITT, INST. RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS 2004-2005 FINAL REPORT 2 (2006), *available at* http://www.rijustice.ri.gov/sac/Executive%20Summary%202004-2005.pdf [hereinafter RHODE ISLAND REPORT].

[24] COMPTROLLER OF THE TN TREASURY, VEHICLE STOPS AND RACE: A STUDY AND RESPONSE TO PUBLIC CHAPTER 910 OF 2000 15-16 (2002), *available at* http://www.comptroller.state.tn.us/orea/reports/racialprofiling.pdf [hereinafter TENNESSEE REPORT].

iii. Hit Rates

Such an outcome might be justified by law enforcement if the widespread disparity in search rates between different racial groups reflected the rates at which those populations violate the law. Studies over the last several years, however, have consistently found *no difference in contraband discovery rate across race* — clear cut proof that racial profiling not only offends core constitutional principles, but is also an ineffective law enforcement strategy. The DOJ, for example, recently concluded that despite the differences in search rates across race, "no measurable differences were found in the likelihood of arrest among white, black, and Hispanic male drivers."[25] Again, this pattern is consistently repeated throughout the United States:

- *California (Sacramento)*: Despite finding variation among search rates across race, a University of Southern California study of traffic stops in Sacramento, California, established that contraband is found at similar rates across race, with African Americans (22.4%) having the lowest rate compared to Hispanics (27.9%) and whites (26.4%).[26]

- *Colorado*: In 2002, whites were more likely to have a seizure of contraband or property during traffic stops when compared to the number of searches that took place. Meanwhile, Hispanics were the *least* likely group to have contraband or property seized during a traffic stop, despite being the group *most* likely to be searched.[27]

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[25] BUREAU OF JUSTICE STATISTICS, *supra* note 13, at 6.

[26] SACRAMENTO REPORT, *supra* note 15, at 8, 34.

[27] COLORADO REPORT, *supra* note 17, at 14.

- *Maryland*: Despite disproportionate search rates involving motorists of color in this state, nothing is seized in 84% of searches of African Americans, 89% of searches of Hispanics, and 83% of whites. There also does not appear to be any meaningful difference in the number of arrests subsequent to stops for blacks and whites.[28]

- *Minnesota*: While 12.61% of African American motorists who were stopped were searched compared to 3.14% of white motorists, contraband was discovered at a rate of 11.17% for African Americans and 23.53% for whites. Similarly, Latinos accounted for 8.55% of searches, but only 9.08% of contraband hits — far below the contraband hit rate for white motorists.[29]

- *Minnesota (St. Paul)*: African Americans, Hispanics and Native Americans were far more likely than whites to be subject to pat down searches and vehicle searches in which no contraband was found. No contraband was found in 19.6% of searches involving African Americans, 16.7% of Hispanics, 16.6% of Native Americans, and 8.4% of whites.[30]

- *Missouri*: In 2005, the contraband hit rate for whites was 23.6%, compared with 18.6% of African Americans and 14.5% for Hispanics. The Attorney General's Office concluded that "this means that on average, searches of African Americans and Hispanics are less likely than searches of whites to produce contraband."[31]

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28 MARYLAND REPORT, *supra* note 7, at 10-11.

29 MINNESOTA REPORT, *supra* note 8, at 22.

30 SAINT PAUL REPORT, *supra* note 9, at 15.

31 MISSOURI REPORT, *supra* note 10.

- *Rhode Island*: White contraband rates in this state are 26.5%, and non-white rates are 22.3%.[32]

- *Tennessee*: As a result of searches in Tennessee, officers seized evidence from 1.8% of Hispanics, 1.6% of African Americans, and 1.2% of whites.[33]

This data establishes that there is no law enforcement rationale to which this Court should defer in considering the racial profiling implications of this case. This Court should not affirm a rule that would leave minorities, who are subjected to disproportionate search rates but do not disproportionately offend, without any Fourth Amendment protections to challenge flatly discriminatory stops and searches.

The Fourth Amendment currently provides an avenue of redress for those subjected to discriminatory stops and searches, whether via a suppression motion or a civil claim challenging racial profiling practices.[34] And, as this Court

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[32] RHODE ISLAND REPORT, *supra* note 23, at 3.

[33] TENNESSEE REPORT, *supra* note 24, at 18.

[34] A number of suits contesting racial profiling practices have resulted in consent decrees or judicial orders that require police departments to collect relevant data, implement officer training programs, and prohibit officers from pulling motorists over on the basis of race or skin color. *See, e.g.*, *Wilkins v. Md. State Police*, No. 93-468 (D. Md. 2003), *available at* http://www.mdsp.org/downloads/consent_decree.pdf; *Arnold v. Ariz. Dep't of Pub. Safety*, No. 01-01463 (D. Ariz. 2006), *available at* http://www.azdps.gov/SettlementAgreement.pdf; *Rodriguez v. Cal. Highway Patrol et al.*, 89 F. Supp. 2d 1131 (N.D. Cal 2000); *Martinez v. Mount Prospect*, 92 F. Supp. 2d 780 (N.D. Ill. 2000); *United States v. New Jersey*, No.99-5970 (D.N.J 1999), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm. Moreover, courts have consistently approved of the use of the Fourth Amendment to redress allegations of racial profiling. *See, e.g.*, *Md. State Conference of*

has recognized, these court actions can have particular bite when they are coupled with a § 1983 claim. *See, e.g.*, *Hudson v. Michigan*, 126 S. Ct. at 2167-68 ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). A ruling that forecloses a legal remedy under the Fourth Amendment for passengers would gut the primary deterrent to such behavior.

It would be unfortunate if after the great strides the lower courts in this country have made to combat racial profiling via the judicial system — and the great strides the states have made to combat racial profiling via increased data collection and reporting — this Court were inadvertently to re-open a door that should properly be closed.

NAACP Branches, et al. v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999).

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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